# STATE OF MICHIGAN

# COURT OF APPEALS

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ROBERT HILL, SHIRLEY HILL, TIMOTHY CARLSON, RANDALL KOLODZIEJSKI, LINDA KOLODZIEJSKI, WILLIAM GLASSON, BEVERLY GLASSON, DAVID ABRAHAM, KRISTIN ABRAHAM, DENNIS D. MARLOWE, DENNIS HIGHT, TRACY HIGHT, TED DOBEK, CAROLYN KUPIEC, FREDERICK CROSS, MICHELLE CROSS, SANDRA POWERS, DANIEL G. OLIVARES, FRANCESCO SIMONE, PAMELA SIMONE, GARY POTAPSHYN, GERALD KOWALSKI, and FRANK VITALE,

Plaintiffs-Appellants,

v

CITY OF WARREN,

Defendant-Appellee.

UNPUBLISHED
February 4, 2003

No. 229292
Macomb Circuit Court
LC No. 2000-001823-CZ

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Before: Zahra, P.J., and Murray and Fort Hood, JJ

PER CURIAM.

Plaintiffs appeal an order denying their motion for class certification pursuant to MCR 3.501(A)(1)(a)-(e). This case was remanded by the Michigan Supreme Court for plenary consideration after it issued its decision in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). We reverse and remand for further proceedings consistent with this opinion.

In the late 1950's and early 1960's, the City of Warren planted silver maple trees on public easements between the sidewalk and street curb in front of residents' homes. In 1967, the city prohibited further planting of silver maples because they grow quickly and should have been planted away from structures and streets to avoid interference with sewers and sidewalks. As the trees matured, their roots outgrew the space in which they were planted, and began to bore into the plaintiffs' adjacent private property. The roots invaded and obstructed the sewer pipes which resulted in raw sewage and water backups into plaintiffs' homes. The roots also grew upward and lifted the concrete sidewalk blocks which caused the sidewalk to be uneven and dangerous. The roots also destroyed the surface of plaintiffs' lawns and killed grass and vegetation. Also,

plaintiffs spent a considerable amount of time and money for cleaning and repairs after their homes were flooded with raw sewage.

Because of certain provisions in the Warren Code, plaintiffs may not remove the silver maples and those residents who have tried to obtain a permit from the Director of Parks and Recreation to remove the trees have been repeatedly ignored or denied permission to do so. Defendant has not compensated plaintiffs for the damage caused by its trees, but has enacted various ordinances in order to help alleviate the problem. These measures include a cost-sharing plan for sidewalk replacement and the formation of a Sidewalk and Tree Board of Review.[1]

On May 2, 2000, plaintiffs Robert and Shirley Hill filed a class action complaint against the City of Warren. On June 23, 2000, plaintiffs filed a first amended class action complaint and added twenty-one named plaintiffs, each of whom were Warren residents who allegedly suffered damages because of the silver maple trees. The trial court denied plaintiffs' motion for class certification on August 2, 2000. On December 1, 2000, this Court initially denied plaintiffs' application for leave to appeal the trial court's order. Then, on January 29, 2001, on rehearing, this Court reversed and remanded the case to the trial court under MCR 7.205(D)(2), for entry of an order granting class certification.

Defendant's application for leave to appeal to our Supreme Court was held in abeyance pending the Michigan Supreme Court's decisions in *Pohutski v City of Allen Park*, Docket No. 116949, and *Jones v City of Farmington Hills*, Docket No. 117935. *Pohutski* and *Jones* were issued on April 2, 2002. *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). On May 30, 2002, in lieu of granting leave to appeal, our Supreme Court vacated this Court's January 29, 2001 order and remanded the case to us for plenary consideration.[2]

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[1] The City enacted Ordinance No. 80-557, effective August 2, 2000 and, in section 33-62, created the Sidewalk and Tree Board of Review. The ordinance provides that:

> a) *Creation*. The Sidewalk and Tree Board of Review is hereby created, composed or three members, appointed by the Mayor and confirmed by City Council, each of whom shall be a resident of the City and who are owners of property assessed for taxation in the City.
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> ***
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> c) *Function*. The Board shall hear complaints of all persons considering themselves aggrieved by special assessments. If it shall appear that any person or property has been wrongfully specially assessed or omitted from the roll, the Board shall correct the roll in such manner as it deems appropriate.

[2] In their Questions Presented, plaintiffs assert that this Court should reverse the lower court's order because "[t]his Court has already ruled that the case should be certified as a class action[.]" However, plaintiffs fail to brief the merits of this claim. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to

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On appeal, plaintiffs contend that the trial court erred by denying class certification pursuant to MCR 3.501(A)(1). We agree.

We review a trial court's ruling on class certification for clear error. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999). "Generally speaking, factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Id.* The requirements for class certification are set forth in MCR 3.501(A)(1)(a)-(e):

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
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> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Plaintiffs argue that the trial court correctly held that they satisfied the numerosity requirement because of the number of silver maples in Warren, the number of complaints the city received regarding damage from such trees, and the city's broad response to the problem. Because there is no specific minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large, the trial court was correct in finding that plaintiffs satisfied MCR 3.501(A)(1)(a). *Zine, supra* at 287. Further, it is evident that the class is so numerous that joinder of all members is impractical. *Id.*

Plaintiffs also contend, correctly in our view, that the trial court clearly erred by ruling that common questions of law and fact would not predominate over questions affecting individual class members. *Id.* at 289; MCR 3.501(A)(1)(b). Regarding plaintiffs' claims alleging trespass-nuisance, negligence, and government taking, the trial court was not persuaded that common issues of liability would predominate over individual issues of causation and

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discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Notwithstanding this failure, we reject plaintiffs' claim because our Supreme Court vacated the prior order and remanded the case for plenary consideration.

damages. Because plaintiffs alleged the identical wrongful conduct by defendant as the basis for all of their claims, we find that the trial court erred by ruling that individual questions would predominate over common questions of law or fact.[3] *Zine*, *supra* at 289.

Plaintiffs further say that the trial court clearly erred by ruling that they did not meet the typicality requirement of MCR 3.501(A)(1)(c). As this Court explained in *Neal v James*, 252 Mich App 12; 651 NW2d 181 (2002):

> The typicality requirement . . . directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." While factual differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [be] based on the same legal theory." In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation." [*Id*. at 21, quoting *Allen v Chicago*, 828 F Supp 543, (ND Ill, 1993) (citations omitted).]

Here, plaintiffs' claims arise from the same course of conduct that gives rise to the claims of the other class members, that is, defendant's tree policy. Plaintiffs' claims are also based on the same legal theories: trespass-nuisance, negligence, and government taking. Therefore, plaintiffs have satisfied the typicality requirement because the claims presented by the class representatives are not only typical, but are exactly the same as the claims of the remaining members of the class. *Neal*, *supra* at 21. The trial court's denial of class certification based on this factor is clearly erroneous.

Additionally, plaintiffs aver that the trial court properly held that they satisfied the requirement of adequate representation under MCR 3.501(A)(1)(d). To determine whether the class representatives can fairly and adequately represent the interests of the class as a whole, "the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action" and "the members of the advanced class may not have antagonistic or conflicting interests." *Neal*, *supra* at 22, quoting *Allen*, *supra* at 553. We are satisfied that plaintiffs' counsel is qualified to pursue this lawsuit as a class action. Further, because all of the plaintiffs have been damaged in similar ways by defendant's tree policy, and have been treated in exactly the same manner by defendant's property maintenance ordinance, we do not believe that members of the advanced class have conflicting interests. Moreover, class members have the option of opting out of the class pursuant to MCR 3.501(A)(3).

Finally, plaintiffs maintain that the trial court erred in determining that a class action lawsuit was not a superior method of adjudication pursuant to MCR 3.501(A)(1)(e). MCR 3.501(A)(2) lists six factors to determine whether a class action is a superior form of adjudication. Our review of the applicable factors indicates that they weigh heavily in favor of

[3] While it is true that specific causation defenses and related damage calculations may be specific to each property, this is often the case in class actions, and does not mean that the commonality requirement is not met. See *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 600; ___ NW2d ___ (2002).

certifying the class. Plaintiffs all allege a common scheme of trespass-nuisance, negligence, and government taking involving defendant's tree policy. All of the plaintiffs' allegations are substantially similar, and stem from the same pattern of defendant's conduct. Further, granting class certification here would promote the convenient administration of justice. *Dix v Am Bankers Life Assur* Co, 429 Mich 410, 418; 415 NW2d 206 (1987). The issues are clearly not so disparate as to make a class action unmanageable. *Id*. at 419. To the contrary, disallowing class certification and forcing plaintiffs to litigate their claims individually would burden judicial resources and place a significant burden on individual homeowners in Warren. Class action is the superior method of adjudication. The trial court clearly erred in denying class certification based on this factor.

After examining the relevant considerations set forth in MCR 3.501(A)(1)(a)-(e), we are left with a definite and firm conviction that the trial court erred in denying plaintiffs' motion for class certification.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood